TENAGA NASIONAL BHD

v.

DOLOMITE INDUSTRIAL PARK SDN BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
NH CHAN JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: B02-512-97]
24 JANUARY 2000

PUBLIC UTILITIES: *Electricity - Construction of pylon without lawful authority - No evidence showing notice of intention to construct pylon given to registered proprietor - Whether amounted to trespass - Alleged existence of wayleave agreement - Whether still necessary to prove that notice given - Electricity Act 1949, ss. 53 and 56*

CIVIL PROCEDURE: *Injunction - Public interest - Disruption of electricity supply in Peninsula Malaysia if injunction granted - Whether public interest outweighed applicant's interest - Whether injunction ought not to be granted if public interest outweighed applicant's interest*

The respondent brought an action against the appellant for trespass claiming that the appellant had, without lawful authority, constructed a pylon on the respondent's land. The High Court found in favour of the respondent and granted, *inter alia*, a declaration that the appellant was not entitled to build the pylon found on the respondent's land and an injunction restraining the appellant from building any pylon on the respondent's land. This was the appellant's appeal. The appellant claimed that it had a wayleave agreement and relied on the Electricity Act 1949 and the Electricity Supply Act 1990 to contend that as a result of such an agreement, it was justified in having the pylon on the respondent's land. However, no wayleave agreement was produced by the appellant. There also was no evidence to indicate that the appellant had given notice of its intention to use the area of land in dispute.

Held:
Per Gopal Sri Ram JCA

[1] Before the appellant could take advantage of s. 56 of the Electricity Act 1949, it must satisfy s. 53 of the said Act, in particular the procedure prescribed by sub-sections (2), (3) and (4). Unfortunately the appellant was unable to produce the document prescribed by s. 53 of the said Act and thus the court was satisfied that there was no wayleave agreement as pleaded by the appellant.

[2] The offending pylon forms part of the national grid for the conveyance of electricity. Therefore, if a mandatory injunction is maintained, there will be disruption of electricity supply in Peninsula Malaysia. It is not in the public interest that such a disruption should occur. The learned judge failed to take into account public interest. If he had done so, he would have held that public interest outweighed the respondent's interest.

[Appellant's appeal partly allowed; mandatory and prohibitory injunctions set aside; order of damages to respondent to be assessed by senior assistant registrar.]

Case(s) referred to:
Smith v. Inner London Education Authority [1978] 1 All ER 411 ***(refd)***

Legislation referred to:
Electricity Act 1949, ss. 53(2), (3), (4), 56

For the appellant - Dennis Appaduray (Rajvinder Singh, Wong Rhen Yen with him); M/s Dennis, Nik & Wong
For the respondent - Wilfred Abraham (Muralee Nair with him); M/s Shearn Delamore & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: 22-105-90]

Reported by S Dharmendran

JUDGMENT

Gopal Sri Ram JCA:

The respondent before us is the registered proprietor of the piece of land. It brought an action against the appellant for trespass. The complaint in the court below is that the appellant without lawful authority constructed a pylon on the respondent's land and thereby committed trespass. After a long and protracted trial the learned judge granted the following relief:

(a) a declaration that the appellant is not entitled to build the pylon found on the respondent's land near its southern border on the eastside or any pylon over or on respondent's land nor have transmission, lines carried over the respondent's land;

(b) an injunction restraining the appellant, its servants or agents from building any pylon on or over or carrying any transmission line over the respondent's land;

(c) an order requiring the appellant to remove any pylon or any transmission line encroaching the respondent's land; and

(d) costs.

The appellant has appealed against these orders.

In the court below the original defence was a bare denial. After the trial commenced the appellant applied to amend its defence. It took the point that it had a wayleave agreement and relied on the Electricity Act 1949 and the Electricity Supply Act 1990. It attempted to show that it was justified in having the pylon on the respondent's land by reason of an existing wayleave. However, as found by the learned judge, the appellant failed to show a wayleave agreement under the relevant legislation referred to.

The appellant did not rely on the common law defence of acquiescence. It proceeded on the basis that at some point in time it must have given notice of its intention to use the area of land in dispute. Needless to say, the learned judge found no difficulty in rejecting that argument.

It is necessary at this point to reproduce the provisions of the law that the appellant relied on in support of its case, namely, ss. 53 and 56 of the Electricity Act 1949. They read as follows:

> 53(1) Subject as hereinafter provided, whenever it is necessary so to do for the purpose of installing any system of distribution of energy under this Act, the Board may lay, place or carry on, under or over any land, other than State land, such supply lines and may erect in or upon any land, other than State land, such posts and other apparatus as may be necessary or proper for the purposes of the Board installation, and may take such other action as may be necessary to render the installation safe and efficient, paying full compensation in accordance with section 58 to all persons interested for any disturbance, damage or disability that may be caused thereby; the compensation may include an annual payment for land used for the purpose of the posts or other apparatus.
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> (2) Before entering on any land for the purposes specified in subsection (1), the Board shall give notice stating as fully and accurately as possible the nature and extent of the acts intended to be done. The notice shall be substantially in the form set out in the Fourth Schedule, and shall specify a date upon which the Collector of Land Revenue will enquire into any objections that have been made as hereinafter provided.

(3) The aforesaid notice shall be given -

(a) in the case of alienated land, to the registered owner or occupier;

(b) in the case of reserved land, to the officer or other person in charge of the reserved land or, in default of any such officer or person, to the Collector of Land Revenue,

and may be sent by registered post or left at the usual or last known place of abode of the person to whom it is to be given or served by the Collector of Land Revenue at the expense of the Board, either in the manner hereinbefore provided or in the manner provided for the service of notices by any written law relating to land in force in the State where the land is situated.

(4) Any of the persons mentioned in subsection (3) may, within fourteen days of the receipt of the notice therein referred to, lodge an objection to the intended acts of the Board. The objection may be made to the Collector of Land Revenue, either verbally or in writing, and the Collector shall give notice of the objection to the State Authority and to the Board.

(5) If no objection is lodged within the time limited for that purpose by subsection (4), the Board may forthwith enter on the land and do all or any of the acts specified in the notice given under subsection (2).

(6) If an objection is lodged and is not withdrawn before the date fixed for the hearing thereof, the Collector of Land Revenue shall hold an enquiry, giving all parties an opportunity to be heard.

(7) Upon the conclusion of the enquiry, the Collector of Land Revenue may, either unconditionally or subject to such terms, conditions and stipulations as he thinks fit, make an order authorizing or prohibiting any of the acts mentioned in the notice given under subsection (2); and any party who is dissatisfied with the Collector's order may appeal against such an order to the State Authority who may then uphold, set aside or vary the order upon such terms, conditions and stipulations as it thinks fit.

(8) The State Authority may, if it thinks fit, *in lieu* of under subsection (7), direct the acquisition of any land or part of any land included in a notice given under subsection (2).

(9) The decision of the State Authority under this section shall be final.

(9A) Notwithstanding any written laws relating to land matters, the Registrar:

(a) upon the production to him of the notice issued by the Board under subsection (2) together with a no-objection statement by the Collector of Land Revenue which is endorsed upon such notice; or

(b) upon the production to him of the original and the deposit with him of a certified copy of an order made under subsection (7),

shall cause to be made on the register document of title relating to the land affected by the notice or order as the case may be, a note of the existence of the rights under the notice or order, as the case may be.

56(1) Nothing in section 53 or section 55 shall -

(a) affect the right of the Board to enter into an agreement, commonly known as a wayleave agreement, with the owner or occupier of any land for the purpose of carrying a supply line across the land; or

(b) affect any such wayleave agreement subsisting at the commencement of this Act.

(2) Notwithstanding any written law relating to land, the Registrar, upon the production to him of the original and the deposit with him of a certified copy of any such wayleave agreement as is referred to in subsection (1), shall cause to be made on the register document of title relating to the land affected by the wayleave agreement a note of the existence of the wayleave agreement.

(3) Where a wayleave agreement relates to land which is a holding included in the Interim Register -

(a) subsection (2) shall apply as if 'Commissioner' and 'appropriate folio of the Interim Register' were substituted for 'Registrar' and 'register document of title' respectively; and

(b) when final documents of title are issued for the land under section 93 of the 1963 Act, any note made pursuant to that subsection as varied by paragraph (a) shall (if it is still effective immediately before the issue of those documents) be entered by the Commissioner on the register document of title and shall continue to have effect as if it had been entered under that subsection.

(4) So long as there remains on the register document of title or the appropriate folio of the Interim Register a note made pursuant to subsection (2) or (3), all dealings with the land to which the note relates shall be deemed to be subject to the rights of the Board under and by virtue of the wayleave agreement in respect of which the note has been made.

(5) Where a note or registration of a wayleave agreement made before 1st January, 1966, pursuant to subsection (2) or (3) as then in force remained effective immediately before that date, then, for the purposes of subsection (4) —

(a) it shall be regarded as a note made pursuant to subsection (2); or

(b) if it relates to land included as a holding in the Interim Register, it shall be entered on the appropriate folio of the Interim Register and shall then be regarded as a note made pursuant to subsection (3).

(6) In this section –

'1963 Act' means the National Land Code (Penang and Malacca Titles) Act, 1963;

'Commissioner' has the same meaning as in the 1963 Act;

'Interim Register' has the same meaning as in the 1963 Act;

'Registrar' has the same meaning as in the National Land Code.

All that we need to say on these provisions is as follows. Before the appellant can take advantage of s. 56 of the Electricity Act 1949, it must satisfy s. 53 of the said Act, in particular the procedure prescribed by subss. (2), (3) and (4). Unfortunately the appellant was unable to produce the document prescribed by s. 53 of the said Act. Under these circumstances, we are entirely satisfied that there was no way leave agreement as pleaded by the appellant. The learned judge was accordingly right in holding against the appellant upon this issue.

That brings us to the question of remedy. The evidence on record shows that the offending pylon forms part of the National Grid for the conveyance of electricity. It is therefore clear that if a mandatory injunction is maintained there will be disruption of electricity supply in Peninsula Malaysia. It is not in the public interest that such a disruption should occur.

In *Smith v. Inner London Education Authority* [1978] 1 All ER 411, Browne LJ held that public interest was always a relevant consideration in granting specific relief. This is how he put it (at p. 422 of the report):

> ... I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed.

No doubt that was said in the context of an interlocutory injunction. But we do not regard the principle to be any different in the case of a final injunction, whether prohibitory or mandatory in nature.

The learned judge in this case failed to take into account public interest. If the learned judge had done so he would have held that the public interest outweighs the respondent's interest. Accordingly we would set aside the mandatory and prohibitory orders made by the court below. This suit is now remitted to the High Court for assessment of damages.

ORDER

The appeal is dismissed. The mandatory and prohibitory injunctions are set aside. In their place is substituted an order for damages to be assessed by the Senior Assistant Registrar of the High Court. Since the appellant partially succeeded in the appeal, the respondent is awarded two-thirds of costs in this appeal. The order for costs in the High Court is not to be disturbed. Deposit to be paid out to the respondent to account of its taxed costs. Suit to be mentioned before the Senior Assistant Registrar High Court on 25 January 2000.